IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 41

PYRAMID MOTOR FREIGHT CORP.,

Petitioner,

vs.

MURRAY ISPASS, MAX GRANOFSKY, HARRY BROWNSTEIN, MAX BERLINSKY, CARROLL MACKLER, LOUIS H. SHAPIRO, SAM LANORITH and JOSEPH GANNON,

Respondents.

REPLY BRIEF IN BEHALF OF PETITIONER

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October 18, 1946.

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There has been received from counsel for the respondents a brief in their behalf. There has also been received from the Solicitor General of the United States a brief on behalf of the Administrator of the Wage and Hour Administrator, United States Department of Labor as *amicus curiae* which the Solicitor General states he authorized to be filed with this Court.

To both documents this short reply is respectfully tendered:

I

The work category of respondents

In this action the United States District Court concluded that the work of the respondents substantially fell into the category of "loaders" as the term was used and was meant to be used by the Interstate Commerce Commission. The Second Circuit Court of Appeals similarly viewed the respondents as coming within the work category of "loaders". From his background of experience the Administrator of the Wage and Hour Division, with even greater positiveness, speaks of the respondents as "loaders" and does not question that their work fitted the pattern of the category or "loaders" as meant to be described by the Commission. Therefore both the trial court and the appellate court and now the Wage and Hour Administrator all concur in the position that the Supreme Court of the United States should deal with the legal questions involved on the basis of that factual determination.

Counsel for the respondents, however, in amazing disregard of the stipulation of facts, in their brief before this Court, would have it understood that the respondents were not loaders at all. They would have this Court disregard the stipulation of facts and instead gather from their brief alone that the respondents were "push cart boys" whose work almost entirely consisted of handtrucking freight packages in the garment center of New York City only between the petitioner's sub-terminal and loft buildings throughout that area. They would have it thought that the loading and unloading was seldom done direct between the parked trucks on the city streets and the nearby buildings by the respondents in this action. They would have it understood that the respondents almost never entered the trucks, only very *rarely* doing so when certain particular packages might be so heavy that they would assist some one else inside the truck.

The stipulation of facts will speak for itself to the contrary of those suggestions. The endeavor of new counsel for the respondents to manufacture an entirely different case by mere assertions of their own as to the governing facts will not mislead this Court.

II

The Administrator of the Wage and Hour Division and the respondents are making a collateral attack on the administrative conclusions of the Interstate Commerce Commission.

This Court will properly understand that in the discharge of his functions it is the regular course of the Administrator of the Wage and Hour Division to institute injunction proceedings to prevent what he deems to be continued violations of the Fair Labor Standards Act. Likewise it is his course to intervene quite frequently when damage actions are brought by employees under that Act for claimed overtime compensations. It is also understood by this Court that through bulletins and other activities the Administrator stimulates the institution of such actions on legal theories espoused by him. In consequence his theories frequently find presentation to the trial courts and not infrequently acceptance by them, state and federal, scattered throughout the country.

The issue here between him and the Interstate Commerce Commission is obvious and finds illustration in a number of trial court decisions he cites. He takes the position that either the Commission should never have determined that truck loaders perform work affecting safety of operations or that in any event out of the component and related parts of their tasks of handling freight as loaders only a portion of it is of such nature that safety of operations would be affected. He accepts the fact to be that the Commission on its part considers that since one of the important components of the work of loaders does directly

affect safety the Commission is authorized by statute to prescribe the maximum hours of the entire work of loaders. Candidly making those concessions the Administrator questions the rightness of the Commission's view. He says in substance that in point of time, i. e., percentages of time, that part of the work of truck loaders which consists of the standing inside *outgoing* trucks in the piling and stacking of the freight shipments is the only part of their work which affects safety and that it is relatively small in point of time as compared with the total time devoted by loaders in the performance of all their related component tasks. Those related tasks consist of "unloading" and also the hand-trucking of freight between the tailboards of trucks, on the one hand, and warehouse or other buildings or other trucks, on the other. Introducing the thought that the relative time percentages should govern his ultimate contention is that as a general rule not enough is devoted to the piling and stacking of freight inside outgoing truck vehicles, relative to the total time devoted to other components of the work as loaders, to affect safety for the purpose of exemption from the Fair Labor Standards Act. He urges upon this Court a comprehensive decision to that effect. The 2nd Circuit Court of Appeals in the present case accepted his point of view.

In a situation of this kind, where there is an evident head-on collision between two different agencies of the United States Government, employers of motor carrier labor cannot, in a proceeding such as this, do more than to emphasize that what the Administrator seeks to do, both through his activities in District Court cases and now before this Court, is to launch his indirect *collateral* attack upon the Commission's determinations. This, it is submitted, is the underlying error of his thinking and of the thinking of the 2nd Circuit Court of Appeals and various of the District Courts in similar situations.

The Commission has made its determination, whether right or wrong, and unless and until it shall be directly reviewed and set aside it is binding. That it is capable of

direct review in a statutory court decision having before it the record made before the Commission is obvious. (*Eldorado Oil Works* v. *United States*, decided by this Court April 22, 1946, No. 428, October Term, 1945). In such a review proceeding the Interstate Commerce Commission would be named either as a defendant or it would be entitled under the reviewing statute directly to intervene. The case would be in charge of the Attorney General of the United States. The record made before the Commission would be before the courts.

Unless and until such direct review action shall be brought and the point of view of the Administrator sustained the law of any case such as this is fixed by action of the Commission. When the Commission determined, rightly or wrongly, that a given work category included performance of laborious tasks which affect safety of operations, even though accounting for only a portion of the time of the work of loaders, that conclusion of the Commission is binding on the courts in any action instituted under the Wage and Hour statute. No one appears to have questioned that that is so when the work of truck "drivers" may be involved. In dismissing actions for claimed overtime pay instituted by drivers of trucks the courts have not independently concluded for themselves whether the work of drivers affects safety. They have deemed themselves to be controlled by the single circumstance that the Interstate Commerce Commission has administratively decided the question and that its decision has not been directly reviewed and set aside.

No different rule is available to the Administrator, or those whom he assists in the institution and prosecution of their damage actions, because the work category involved may not be that of drivers but might be that of mechanics or loaders, etc. It is as much the duty of the courts to respect the administrative conclusion of the Commission in regard to loaders and mechanics as it is in regard to drivers.

The candor of the Adminstrator is refreshing. He directly challenges the rightness of the Commission's views

in regard to loaders. The trial courts and the 2nd Circuit Court of Appeals, not because of any lack of candor but because of a misunderstanding on their part, have supposed that they are free to whittle down and emasculate the Commission's administrative determinations with regard to loaders and mechanics by introducing the "percentage" of time theory. But no less is that a collateral attack on the Commission's administrative functions than is the more obvious challenge now proposed to this Court by the Administrator himself.

III.

Delay in Docketing and Filing of the Record.

Counsel for the respondents say in their brief that the "Court" (the 2nd Circuit Court of Appeals) late in July, 1945, "extended his time for docketing the appeal and filing his record. It is further said that counsel for the petitioner did not object.

Both statements are inexcusably erroneous. More than three months after the original notice of appeal the present counsel for respondents went to a *single judge* of the Court of Appeals for an extension and obtained from him an order purporting to grant it. Not only did counsel for the petitioner protest to that judge the taking of any such action but it is now decided by the Circuit Court of Appeals for the 9th Circuit that no such order would be "valid". That Court said:

> "On May 31, 1945, appellant moved for and obtained from a judge of this court an order purporting to extend the time for filing the record to June 16, 1945; but, having been made after the expiration of the period for filing as previously extended, the order of May 31, 1945, was invalid and ineffective. The record was filed here on June 14, 1945—14 days late.

For Appellant's failure to comply with Rules 73(g), 75(a) and 75(d) no excuse is shown. The failure does not affect the validity of the appeal, but is ground for such action as we deem appropriate. The action we deem appropriate is dismissal of the appeal." (*U. S.* v. *Gallagher*, 151 F. (2d) 556.)

Here the delay was not 14 days but close to *four months*. Even the 2nd Circuit Court of Appeals declared the purported excuse for the delay was "feeble". The action required to be taken plainly was one of dismissal of the appeal.

Conclusion

It is respectfully urged that the judgment of the court below as to all but Shapiro should be reversed and the judgment of the District Court affirmed.

Respectfully,

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October 18, 1946.